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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRETT LEONARD MOORE, Defendant and Appellant.	A120091 (Contra Costa County Super. Ct. No. 05-071082-2)

A jury convicted Brett Leonard Moore of indecent exposure as a felony offense. The court sentenced him to the middle term of two years in state prison. On appeal he asserts as error: (1) the prosecutor's exercise of a peremptory challenge against a Hispanic prospective juror, (2) a jury instruction permitting consideration of a prior indecent exposure conviction as evidence of a common plan or scheme, and (3) the court's restriction on defense counsel's closing argument. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Moore was charged with the felony offense of indecent exposure after having been previously convicted of the same offense in 2006. (Pen. Code, § 314).[1] The following evidence was presented during a jury trial on the current charge.

[1] Penal Code section 314 provides, in pertinent part: "Every person who willfully and lewdly . . . [¶] Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor." (*Id.* at subds. (1), (2).) The second and each subsequent

On a quiet weekday afternoon in February 2007, Roxanna Sotomayor was walking her dog in her neighborhood. As she walked on the sidewalk across the street from a house, she heard a throat-clearing noise from a second-floor window of the house as if someone was calling for her attention. She looked up and did a double-take when she saw Moore at the window, clad only in a red bra and red women's panties. Moore, who appeared to be standing on something, was visible from mid-thigh up to his head. He and Sotomayor made eye contact for "[a] few seconds."

Moore had both hands at the waist of the underwear, "like . . . he was about to take it off." Sotomayor saw a quick flipping motion, as Moore flipped the underwear down "probably like an inch," and she looked away. Sotomayor could not recall if the flipping motion exposed more of Moore's skin, and she did not see Moore pull the underwear down below his genital area. It appeared to her that Moore was about to expose his private parts and she looked away because she did not want to see "[w]hatever he wanted to show me [¶] . . . [¶] [h]is penis." Sotomayor did not look back until she had almost reached the corner of the street. When she looked back, Moore was looking out a different window. Sotomayor went home after she told a neighbor about the incident and he told her he would call the police.

Shortly thereafter, police officers Robert Solari, his partner Eric Yunck, and their supervisor, Corporal Ouimet, responded to Moore's house. Officer Solari knocked, and Moore answered the door, wearing a see-through camouflage shirt and black shorts. When the officers asked to speak with him, Moore stepped outside onto the front porch and sat down on the top step. The position in which he was sitting allowed the officers to see through the leg opening of his shorts; they saw he was wearing red lace women's underwear. After obtaining preliminary information from Moore, Officer Solari left to interview Sotomayor. The other officers went upstairs with Moore to his bedroom. The officers saw an open window, a screen leaning on the wall next to it, a chair in front of

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conviction under subdivision 1 of the section (exposure in a public place) constitutes a felony punishable by imprisonment in state prison. (*Id.*)

the window, and a coffee cup on the window sill. A red bra and pornographic magazines were on the bed.

As Sotomayor described the incident to Officer Solari, she was upset and shaken, stuttering, and tripping over her words. Solari took her to Moore's house to see if she could identify the person she had seen in the window. As they approached the house, Sotomayor looked up, saw Moore standing at the window, and exclaimed, "[T]hat's him, that's him." "She was very specific, very quick, . . . very determined that that was who she saw." Officer Solari recalled Sotomayor specifically told him in her own words that Moore had "pulled down the red panties," exposing his "genitals" and she turned away quickly.[2]

Officer Solari returned to the house and continued his interview with Moore. The officer asked Moore to take his shorts off and remove his underwear so that it could be collected as evidence. Solari saw that Moore was wearing two pairs of women's underwear, a red mesh see-through thong under red lace briefs, which items were introduced into evidence.[3] The top of the briefs came to the level of Moore's hipbone, leaving 3/4 to 1 inch of pubic hair exposed. The thong was cut lower than the briefs. No part of Moore's genitalia appeared outside the underwear. Officer Solari could see Moore's genitalia "underneath" "both layers" of underwear but not in great detail.

As part of her case in chief, the prosecutor introduced evidence of Moore's prior conviction for indecent exposure as a misdemeanor based on his guilty plea. The jury was shown a copy of the misdemeanor complaint setting out the basic elements of the charge. The complaint alleged that in May 2006, Moore "did willfully, lewdly, and unlawfully expose his person and private parts thereof, in a public place, and in a place

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[2] The officer did not ask Sotomayor to specifically describe Moore's genitalia or describe whether she was able to actually see a penis. Sotomayor testified that she did not give the officer a description of Moore's genitals because she did not see them. However, she was not confronted with Officer Solari's testimony that in his report he had indicated she had used the words "pulled down the red panties" and "genitals."

[3] Sotomayor testified that she could not tell if Moore was wearing another pair of underwear under the pair of underwear that was visible to her.

where there were present other persons to be offended and annoyed thereby." The parties stipulated that Moore was the person named in the prior conviction, but not that the prior conviction was true even though no evidence to the contrary was submitted by the defense. Moore did not testify and called no witnesses.

The jury found Moore guilty of indecent exposure as a felony offense. He was sentenced to the middle term of two years in state prison. Moore filed a timely notice of appeal.

DISCUSSION

I. Denial of Moore's *Wheeler/Batson* Motion

A. Relevant Facts

The trial court conducted jury selection by calling and questioning eighteen prospective jurors. The parties then asserted challenges for cause. Those jurors removed were replaced and the process continued until 18 prospective jurors remained. The trial court then allowed each party to exercise up to 10 peremptory challenges. The prosecutor exercised three challenges and the defense used four, leaving 11 remaining prospective jurors. The twelfth seat remained vacant, so the trial court called seven additional names to bring the number of prospective jurors to 18. E.G. was called to seat 13. E.G.'s responses to questioning by the court and the parties established that at the time of the trial he was 27 years old. "[W]hen [he] left high school" at about 16 years of age he "went straight into" painting work and he had "been working as a painter . . . since 16." At his current job, he had supervisory responsibilities but he did not hire or fire employees. He lived with his ill mother, and his brother, a truck driver who was studying to be a police officer. E.G. had never served on a jury, but indicated he would be able to return a guilty verdict if the prosecutor proved all the elements beyond a reasonable doubt even if he felt sorry for the defendant or did not like the victim. The defense challenged the prospective juror in seat 8, and E.G. moved into that seat in the jury box. The prosecutor immediately used her fourth peremptory challenge to excuse E.G. The

defense then moved to set aside the prosecutor's excusal of E.G. pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

The court heard argument on the *Wheeler/Batson* motion outside the presence of the venire panel. Defense counsel argued that based upon his view of the jurors, "there ha[d] been one Hispanic male, . . . [E.G.]. I don't believe that there have been any other males of Hispanic descent. [¶] . . . I don't believe there have been any other Hispanic females, and I could be incorrect about that." The court thought there was a prospective Hispanic female juror then seated as juror no. 11. Counsel submitted on the ethnicity of juror no. 11 because counsel did not have an independent recollection of the juror's appearance. The court then indicated it would take counsel's word that E.G. was the only Hispanic male, but queried, "what about [N.D.]?[4] Without waiting for a response to the question, the court asked counsel to make his record with regard to E.G. Defense counsel then argued that there was no reason for E.G.'s removal except for his ethnicity, noting that there was no cause to challenge him, that he was a painter, his brother was currently studying to be a police officer, and he lived with his mother. E.G. had also responded that he would not hold the prosecutor to a higher burden than the required standard of

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[4] Hispanics are a cognizable group for purposes of a *Wheeler/Batson* motion. (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.) For *Wheeler/Batson* purposes, "Hispanic" refers to individuals of Spanish or Latin-American descent as well as individuals with Spanish language surnames where the ethnicity of the jurors is otherwise unknown. (*People v. Trevino, supra,* 39 Cal.3d at pp. 685-686; see also *Hernandez v. Texas* (1954) 347 U.S. 475, 480, fn. 12.) In this case, neither defense counsel nor the court indicated whether the ethnicity of jurors was based on their appearance or Spanish surnames. During the argument on the *Wheeler/Batson* motion, defense counsel and the court referred to three prospective jurors of Hispanic or possible Hispanic descent. However, the record indicates that there was a fourth prospective Hispanic male juror (C. F-P.), who was "originally from Spain," and had a Spanish first name and surname. C. F-P. was first passed by the prosecutor but then immediately excused by defense counsel's peremptory challenge.

proof. In response, the trial court stated: "Well, my own personal observations were . . . [that] when he was first called to seat number 13, he slouched very much. He had a body attitude that was very obvious, but he does sit directly behind you, and I can see why you could not see that. He seems, based on his answers, not to be a high school graduate. He said he's been painting full-time since he was 16. He's now 27, and he just – had a real body attitude there. I do not see any reason to believe that he was struck because [he was] a Hispanic male. [¶] So the motion is denied." The prosecutor apparently sought to state her reasons for the peremptory challenge, but the court cut her off: "No, I don't want you to. I have not [found] a prima facie case, so I'm not asking you to do it."[5] Jury

[5] Moore argues that at the prima facie stage of the analysis, the trial court was required to seek reasons from the prosecutor for the peremptory challenges rather than offering its own explanations. However, this specific argument has been rejected by decisions of our Supreme Court (*People v. Lancaster* (2007) 41 Cal.4th 50, 75-76 (*Lancaster*); *People v. Cornwell* (2005) 37 Cal.4th 50, 73-74, disapproved in part on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22) (*Cornwell*), which we are bound to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nevertheless, we note in passing that shortly before the trial in this case, our Supreme Court "encourage[d] court and counsel in all *Wheeler/Batson* proceedings to make a full record on the issue" by having the prosecutor state the reasons for the challenged excusals for purposes of appellate review. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105, fn. 3, disapproved in part on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Obviously, it will often be beneficial if the trial court asks or allows the prosecutor to set forth the reasons for the peremptory strike, " 'while everything is fresh in everybody's mind[s].' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, fn. 9 (*Hamilton*).) However, as the court in *Zambrano, supra*, 41 Cal.4th 1082, explained, "[w]e stress . . . that the prosecutor is not *obliged* to state his reasons before the court has found a prima facie case. Until that time, the defendant carries the sole burden to establish an inference of discrimination. At this early stage, the prosecutor is not compelled to provide information which the defendant might then employ to argue the existence of a prima facie case. [Citation.] Moreover, the prosecutor's voluntary decision to state reasons in advance of a prima facie ruling does not constitute an admission or concession that a prima facie case exists." (*Id*. at p. 1105, fn. 3.) Also, if the trial court determines that defendant has not made a threshold showing of a prima facie case, the court does not need to take into account the prosecution's justification for the excusal. (*Hamilton, supra,* 45 Cal.4th at p. 898, fn. 9; but see *People v. Mayfield* (1997) 14 Cal.4th 668, 723-

selection resumed, and the court seated the next prospective juror in the seat vacated by E.G. Moore exercised a final peremptory challenge and the parties accepted the jury, which included juror no. 11.

B. Moore Did Not Establish a Prima Facie Case of Discrimination

Moore contends that the trial court erred in concluding that he had failed to make a prima facie showing of discrimination, thereby violating his federal equal protection and due process rights and his state constitutional right to a trial by jury. We disagree.

"Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. [Citations.] Such a use of peremptories by the prosecution violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*); see *Batson, supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.)

The procedure to evaluate claims of discriminatory use of peremptory challenges is the same under both the state and federal Constitutions. (*Bonilla, supra,* 41 Cal.4th at p. 341.) "There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. [Citations.]" (*Ibid*.) When a defendant objects to a prosecutor's use of a peremptory challenge, the procedure "is settled: 'First, the defendant must make out a prima facie case by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made

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724 [even if the trial court does not find a prima facie case, it may properly consider reasons given by the prosecutor].)

out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the [peremptory challenge] has proved purposeful racial discrimination." [Citation.]' [Citations.]" (*Lancaster, supra,* 41 Cal.4th at p. 74, quoting *Johnson v. California* (2005) 545 U.S. 162, 168.)

To the extent Moore raises the issue, we need not address whether the trial court applied the correct standard in evaluating the *Wheeler/Batson* motion. "Ordinarily, we review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions. [Citation.]" (*Bonilla, supra,* 41 Cal.4th at p. 341.) However, "[w]here it is unclear whether the trial court applied the correct standard, we review the record independently to 'apply the [correct] standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis. [Citations.]" (*People v. Bell* (2007) 40 Cal.4th 582, 597 (*Bell*).) Our independent evaluation supports upholding the trial court's denial of the *Wheeler/Batson* motion in this case.

"When a trial court denies a [*Wheeler/Batson*] motion . . . after finding no prima facie case of group bias, we consider the entire record of voir dire for evidence to support the trial court's ruling. If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, we affirm. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 116 (*Yeoman*).)

At issue here is the first or prima facie stage of an inquiry in a *Wheeler/Batson* analysis. Moore has the burden of showing " ' "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." ' [Citations.]" (*Hamilton, supra,* 45 Cal.4th at p. 899, quoting *Johnson v. California, supra,* 545 U.S. at p. 168.) He argues that the following factors satisfied his burden: (1) a statistical analysis of the prosecutor's use of peremptory challenges; (2) the lack of any established, non-speculative factor that

would indicate E.G. had a characteristic unfavorable to the prosecution or could not be impartial; and (3) the presence of at least one characteristic that would typically render him a juror favorable to the prosecution. We conclude for the following reasons that Moore has fallen "far short of 'showing that the totality of the relevant facts [gave] rise to an inference of discriminatory purpose.' [Citations.]" (*Lancaster, supra,* 41 Cal.4th at p. 78.)

Moore incorrectly relies on a statistical analysis based on the circumstances that the prosecutor used one of four peremptory challenges to excuse E.G. and that by this challenge the prosecutor eliminated one of two Hispanic jurors. "Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case, including this one, to make a prima facie case after the excusal of only one or two members of a group is very difficult." (*Bell, supra,* 40 Cal.4th at p. 598, fn. 3; *Bonilla, supra,* 41 Cal.4th at p. 343, fn. 12.) On this record, we conclude that the prosecutor's challenge to one of two Hispanic jurors does not support an inference of bias, particularly in view of the countervailing circumstances that: (1) there is no evidence that Moore is of Hispanic ethnicity[6] (*People v. Hoyos* (2007) 41 Cal.4th 872, 901; *Bell, supra,* 40 Cal.4th at p. 597), and (2) the other Hispanic juror "had been passed repeatedly by the prosecutor . . . and ultimately served on the jury." (*People v. Cornwell, supra,* 37 Cal.4th at p. 70).

Our independent examination of the record also reveals race-neutral grounds on which the prosecutor might reasonably have challenged E.G., including his limited

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[6] As the proponent of the *Wheeler/Batson* motion, Moore was not required to be a member of the allegedly excluded group. (*Powers v. Ohio* (1991) 499 U.S. 400, 402 ["a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races"].) But, in determining if a prima facie case has been presented we may consider whether the defendant is a member of the excluded group. (*Wheeler, supra,* 22 Cal.3d at p. 281; *Bell, supra,* 40 Cal.4th at p. 597 ["defendant's membership in group allegedly excluded . . .is relevant *Batson* circumstance"].)

education[7] and his demeanor in the courtroom as described by the trial court. (See, e.g., *Batson, supra,* 476 U.S. at p. 89, fn. 12 [prospective jurors may be evaluated based upon their education]; *United States v. Marin* (7th Cir. 1993) 7 F.3d 679, 686 ["[t]he attainment of a certain educational level has been accepted by numerous [federal circuit courts of appeal] as a race-neutral criterion for exercising a peremptory challenge under the *Batson* mandate"]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1203 ["peremptory challenges are properly made in response to ' " 'bare looks and gestures,' " ' or the demeanor of a prospective juror"], disapproved in part on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Neuman* (2009) 176 Cal.App.4th 571, 585-588 [no prima facie case shown as the prosecutor may have stricken the challenged jurors on several grounds including their youth and limited life experience].)[8] "Because the record suggests these race-neutral reasons why the prosecutor might reasonably have

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[7] While Moore correctly takes issue with the court's assumption that E.G. might not have been a high school graduate, we reject any contention that the court "employ[ed] a stereotype about [the] likelihood of [E.G.] obtaining [that] minimal academic achievement." Given the content of E.G.'s responses during voir dire, a reasonable inference can be drawn that E.G. had not pursued any further formal educational opportunities after he "left high school" at 16 and since that time he had been working as a painter. We also reject Moore's argument that no consideration should be given to E.G.'s limited education on the ground that there was another non-Hispanic juror who served on the jury who was as likely not to have graduated from high school. At this prima facie stage of the case, a comparative juror analysis, conducted for the first time on appeal, " 'has little or no use where [our] analysis does not hinge on the prosecution's actual proffered rationales . . . .' [Citation.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296, see *People v. Hawthorne* (2009) 46 Cal.4th 67, 80, fn. 3.) Even assuming such a comparison was appropriate, there is insufficient evidence in the record to make an accurate comparison between E.G. and any other prospective juror who was ultimately chosen to hear the case.

[8] In light of our determination, we need not address the Attorney General's contention that the prosecutor could have also excused E.G. based on his written responses to a one-page juror questionnaire.

preferred other jurors, the trial court's decision not to find a prima facie case as to [E.G.] must be affirmed. [Citation.]" (*Yeoman, supra*, 31 Cal.4th at p. 116.)[9]

II. CALCRIM No. 375 Jury Instruction

Before trial began the prosecutor sought to admit evidence of Moore's prior conviction for indecent exposure based upon a May 2006 incident in an empty car of an in-service BART train, when Moore was discovered with his pants down, masturbating his exposed penis. The prosecutor contended that evidence of the prior sexual offense was admissible under Evidence Code section 1108.[10] Defense counsel opposed admission of the facts underlying the prior conviction on the grounds that the prior offense was dissimilar and more serious than the currently alleged offense, and admission of either the prior offense or conviction would be too prejudicial in that it would be confusing to the jury and lead them to convict based upon the prior more serious offense. (Evid. Code, § 352). The prosecutor replied that Evidence Code section 1108 permitted the admission of the prior sexual offense even though it was factually dissimilar from the charged offense; and the evidence was admissible to show lack of accident or mistake under Evidence Code section 1101, subdivision (b). The prosecutor noted, however, that she did not have to present evidence of the facts underlying the prior conviction, thus

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[9] We reject Moore's request that we follow certain decisions of the federal courts of appeal that are contrary to the California Supreme Court decisions cited in this opinion. Although decisions of the lower federal courts are persuasive authority, they are not binding on us even on federal questions (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), and we will not follow them when they diverge from California Supreme Court decisions that we are bound to follow. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455; see *People v. Neuman*, *supra*, 176 Cal.App.4th at pp. 578-579, 582-583 [appellate court declines to follow federal cases that are contrary to decisions by California Supreme Court].)

[10] Evidence Code section 1108 reads, in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

mitigating defense counsel's concerns that the jury would be prejudiced by that evidence. The trial court ruled that evidence of the prior conviction itself, but not the underlying facts, would be admitted under Evidence Code section 1108 to show Moore's propensity to commit a sexual offense. The court did not rule on the prosecutor's request that the evidence also be admitted pursuant to Evidence Code section 1101, subdivision (b).

At the conclusion of the evidence, the trial court instructed the jury, without objection by defense counsel, on the use of the prior conviction pursuant to Evidence Code section 1108, using the language in CALCRIM No. 1191 (2006-2007 ed.) p. 1069. In relevant part, the jury was told as follows: "You may consider this evidence – what I'm talking about is the prior conviction that you're going to be looking at. You may consider this evidence only if the People have . . . proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. . . . [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. If you decide that the defendant committed this uncharged offense, you may but are not required to conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the offense as charged here. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of the offense in this case. The People must still prove each element of the charge beyond a reasonable doubt."

Immediately after the above quoted instruction, and again without objection by defense counsel, the court instructed the jury on additional uses of the prior conviction pursuant to Evidence Code section 1101, subdivision (b), using the language in CALCRIM No. 375 (2006-2007 ed.) pp. 161-163. Thus, the jury was told as follows: "The People presented evidence, again, referring to the prior conviction, if you find it to be true, the presented evidence of other behavior by the defendant not charged in this

case. You were not given any particulars, but you're going to be given a piece of paper to look at regarding the prior. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged acts. [¶] . . . If you decide that the defendant committed the uncharged act, you may but are not required to consider that evidence for the limited purpose of deciding whether or not: [¶] 1. The defendant was the person who committed the offense alleged in this case; [¶] 2. The defendant acted with an intent to direct public attention to his genitals for the purpose of sexually arousing or gratifying himself or sexually offending another person; [¶] Or, that the defendant had a motive to commit the offense alleged in this case; [¶] Or, that the defendant knew another person could be sexually aroused or offended when he allegedly acted in this case; [¶] Or, the defendant's alleged actions were the result of a mistake or accident; [¶] Or, that the defendant had a plan or scheme to commit the offense alleged in this case.[11] [¶] In evaluating this evidence, do not consider this evidence for any other purpose except for the limited purpose I have just previously stated. [¶] If you conclude that the defendant committed the uncharged act, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the offense in this case. The People must still prove each element of the charge beyond a reasonable doubt."

On appeal, Moore does not contend that his prior conviction was inadmissible at trial, and acknowledges that it established an element of the felony offense of indecent exposure (§ 314) and was properly admitted to show his disposition to commit a sexual offense (Evid. Code, § 1108). He also acknowledges that many of the evidentiary

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[11] Although at this point the CALCRIM No. 375, *supra*, p. 162, provides an additional sentence instructing the jury to consider the similarity or lack of similarity between the prior conviction and the alleged charged offense, the court apparently did not include the sentence because the jury had already been instructed that it had not been given the particulars of the prior conviction and obviously no comparison could be made by the jury.

purposes identified in CALCRIM No. 375 were either not disputed by the defense or subsumed within the concept that the prior conviction could be considered to show his disposition to commit a sex offense. He challenges the admissibility of the prior conviction on the ground that it does not show a common plan or scheme (Evid. Code, § 1101, subd. (b)), and asserts that the court erred in instructing the jury that they could consider the prior conviction for this purpose. Because he concedes his prior conviction was properly admitted pursuant to Evidence Code section 1108, we find no error in its admission and turn to the instructional error he asserts. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 280-281 ["Because the court found the testimony admissible under both [Evidence Code] sections [1101 and 1108], we would only find error in its admission if the testimony were inadmissible under both"].)

Moore argues that the court's instruction that the jury could use his prior conviction for "common plan or scheme" purposes was erroneous and prejudicial. We conclude that although the instruction should not have been given, Moore has failed to establish prejudicial error requiring reversal.

"[I]n general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*People v. Collie (*1981) 30 Cal.3d 43, 64, fn. omitted; see Evid. Code, § 355 ["[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"].) Nevertheless, "when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately." (*People v. Nottingham* (1985) 172 Cal.App.3d 484, 497; see *People v. Swearington* (1977) 71 Cal.App.3d 935, 949.)

At the time of the trial in 2007, the Bench Notes to CALCRIM 375 informed the trial court that it "must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance." (Bench Notes to

CALCRIM No. 375, *supra,* p. 164.) The instruction itself, in highlighted language, tells the trial court to "<*SELECT SPECIFIC GROUNDS OF RELEVANCE AND DELETE ALL OTHER OPTIONS*.>" (*Id*. at p. 161.) Here, there was no factual basis for the CALCRIM 375 instruction on a common plan or scheme in the absence of evidence of the underlying facts of the prior conviction. Upon reviewing the prosecutor's request for the instruction, the trial court should have refused to instruct the jury that the prior conviction could be used as evidence of a common plan or scheme. The prosecutor's request for the instruction and Moore's failure to object to the instruction as given "did not absolve the trial court of its obligation under the law to instruct the jury on the 'general principles of law that [were] closely and openly connected to the facts and that [were] necessary for the jury's understanding of the case.' " (*People v. Moon* (2005) 37 Cal.4th 1, 37; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [trial court has a duty to ensure that the instructions it gives are correct and complete]).

Nevertheless, "[w]here, as here, the court gives a legally correct, but irrelevant, instruction, the error 'is usually harmless, having little effect "other than to add to the bulk of the charge." ' [Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 841; see *People v. Carpenter* (1997) 15 Cal.4th 312, 393 ["[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution"]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130 [generally, court's failure to remove unsupported theory from jury's consideration does not suggest violation of federal constitution].) Reversal is required "only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178; see Pen. Code, § 1259 [appellate review is permitted to the extent an unchallenged instructional error affects a defendant's "substantial rights"].)

Moore argues that the CALCRIM No. 375 instruction given on the issue of common plan or scheme was prejudicial because it invited the jury to speculate on whether the prior conviction was based on the same circumstances as in the charged offense. He also contends that the instruction allowed the jury to find, based on the fact that he had pleaded guilty to a prior offense with the same statutory elements as the current offense, that he had employed a common scheme or plan. Moore's arguments are not persuasive.

"[I]f the instructions were susceptible of the interpretation [Moore] now asserts, counsel likely would have objected at trial on this basis. Such an omission suggests that ' "the potential for [prejudice] argued now was not apparent to one on the spot." ' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1203.) In closing arguments, defense counsel and the prosecutor focused exclusively on the evidentiary value of the prior conviction as it related to Moore's intent, lack of mistake or accident, or propensity to commit sex offenses; neither counsel asked the jury to consider the prior conviction as evidence of a common plan or scheme to commit the charged offense. Therefore, "we are confident that the jury was not sidetracked by the correct but irrelevant instruction [regarding a common plan or scheme], which did not figure in the closing arguments." (*People v. Crandell* (1988) 46 Cal.3d 833, 872-873.) Additionally, it is highly unlikely the jury assigned any meaningful value to the prior conviction on the issue of a common plan or scheme as they were not told the underlying facts that led to the prior conviction. "The very fact which makes the instruction . . . erroneous—absence of any evidence to support it—suggests that the jury ignored this dim will-o'-the-wisp and passed on to the tangible issues in the case." (*Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, 371.)

We therefore conclude that reversal is not warranted because it is not reasonably probable a result more favorable to Moore would have occurred in the absence of the challenged instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. Trial Court's Restriction on Defense Counsel's Closing Argument

Moore contends that his state and federal constitutional rights to effective assistance of counsel were violated when the trial court sustained the prosecutor's objection to a portion of defense counsel's closing argument. We disagree.

As noted, prior to trial the court ruled that evidence of Moore's prior conviction, but not the underlying facts, could be admitted into evidence. During closing argument, defense counsel argued that "[t]he prosecution has also talked about this prior conviction of Mr. Moore, something that he took responsibility for and something that he pled to, something that he didn't litigate in a jury trial. . . . They want you . . . to think, well, we may not have the evidence here in this case, we may not be able to prove beyond a reasonable doubt that Mr. Moore, in fact, exposed his genitals, but he pled guilty to this other case, so he probably did it here, even though we can't show it to you, we can't prove it to you, don't worry about that because he was convicted before, he pled guilty before, and that's all you need to know. And I think that's actually pretty scary, particularly when we don't have any evidence of what took place with respect to that prior." At that point, the prosecutor objected, stating: "Objection, given the Court's rulings." The trial court sustained the objection. Defense counsel immediately resumed his argument: "Particularly, when we're talking about what happened on February 1st, 2007, not about what happened on some other date."

Moore argues that the trial court improperly sustained the prosecutor's objection because his counsel was only attempting to minimize the probative value of the prior conviction, not to violate the court's pretrial ruling that certain facts would not be admitted into evidence. We disagree. Comments during closing argument on a party's failure to introduce certain evidence are generally permissible. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1339; *People v. Medina* (1995) 11 Cal.4th 694, 755-756.) However, "[i]t is axiomatic that counsel may not state or assume facts in argument that are not in evidence." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.) Taken in

context, defense counsel's closing remark appeared to improperly imply to the jury that the facts underlying the prior conviction would not support the charge that Moore committed the current offense. If counsel had wanted to argue that the jury should not speculate about the facts underlying the prior conviction, counsel should have asked the court for clarification of its ruling.

We also reject Moore's related contention that the trial court erred by precluding defense counsel from arguing that the prior conviction should not be considered because there was no evidence of its underlying facts, while at the same time instructing the jury that it could consider the prior conviction as evidence of a common plan or scheme to commit the charged offense. Defense counsel was not precluded from arguing that the fact of the prior conviction, standing alone, was not evidence of a common plan or scheme. If defense counsel thought the underlying facts of the prior conviction would persuade the jurors that they should give no evidentiary weight to the prior conviction, he could have presented those facts as part of the defense case. Defense counsel raised no objection when the court precluded the prosecutor from presenting evidence of the facts underlying the prior conviction. Counsel could not then suggest to the jurors that, because they had not been told the facts underlying it, the prior conviction was of questionable evidentiary value.

Even assuming the trial court erred, Moore has failed to show that the ruling prejudicially impacted his right to effective assistance of counsel. Throughout closing argument, defense counsel asserted that the prosecution was asking the jury to speculate as to whether Moore had exposed himself, that this element had not been proven by the evidence including the prior conviction, and that the prosecution had not met its burden of proof. Defense counsel also argued fervently that the jury should not find Moore guilty simply because he had previously pleaded guilty to the same offense. On one occasion the trial court restricted counsel from asking the jurors to discount the prior conviction on the ground that they had not been told the facts underlying the prior

conviction. However, defense counsel was not deterred by the court's ruling. He later returned to the subject, and, with no objection by the prosecutor, defense counsel referred to "this prior conviction that . . . we don't know anything about. . . ." We therefore conclude that "the court's ruling did not significantly limit the defense's opportunity to participate in the adversary process and hence did not infringe on [Moore's] constitutional right to the assistance of counsel." (*People v. Bonin* (1988) 46 Cal.3d 659, 695, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.